Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Radio Perry, Inc.	)	
(WPGA-TV, Perry, Georgia)	)	
	)	CSR-8306-M
v.	)	
	)	
Cox Communications, Inc.	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 2010 **Released: July 16, 2010**

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Radio Perry, Inc. ("Perry"), licensee of television broadcast station WPGA-TV, Virtual Channel 58, Perry, Georgia ("WPGA"),[1] filed the above-captioned complaint against Cox Communications, Inc. (Cox). The complaint asks that we order carriage of WPGA on Channel 6 of Cox's Macon, Georgia cable system (the "system").[2] An opposition was filed by Cox,[3] to which Perry replied.[4] For the reasons discussed below, we grant Perry's petition in part, finding that it is a must-carry station under our rules, but decline to rule on its channel positioning claims.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act, and implementing rules adopted by the Commission, a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market.[5] A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.[6]

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[1] Part of the Macon, Georgia DMA. *See infra* note 7.

[2] Perry Mandatory Carriage and Channel Positioning Complaint, CSR-8306-M (Filed March 19, 2010) ("Petition").

[3] Opposition of Cox (Filed April 19, 2010) ("Opposition").

[4] Reply of Perry (Filed April 29, 2010) ("Reply").

[5] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2976-2977 (1993).

[6] Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Commission's rules requires that a commercial broadcast television station's market be defined by The Nielsen Company's DMAs. *See* 47 C.F.R. § 76.55(e). The Nielsen Company was previously named Nielsen Media Research.

3. The Commission has clarified that "broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent."[7] A station not electing retransmission consent by October 1 of the year prior to the first year of a carriage cycle is deemed to have elected must carry.[8] With respect to the channel number on which stations asserting (or defaulting to) must carry rights are to be carried, Section 614 of the Act and Section 76.57 of the Commission's rules provide commercial television stations with three options.[9] Pursuant to Section 76.57(a), a commercial broadcast station may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station was carried on July 19, 1985; or, (3) the channel number on which the station was carried on January 1, 1992. The Act and the rules also provide that a broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.[10] The Commission has clarified that these rules apply fully in the digital context.[11]

III. DISCUSSION

4. There is no dispute regarding the relevant facts of the case. WPGA has been carried on the system since 1995. It failed to make any carriage election prior to the October 1, 2008 election deadline for the 2009-2011 carriage cycle. On October 17, 2008, the cable system sent Perry a letter stating that "pursuant to Section 76.64(f)(3)[of the Commission's Rules], Cox deems the Station to have made a default election for must-carry status."[12] Perry objected to the planned carriage of WPGA by Cox as a mandatory carriage station, and the parties ultimately signed an agreement, dated January 1, 2009, entitled "Retransmission Consent and VOD License Agreement" (the "Agreement"). Section 2(b) of the Agreement reads, in its entirety:

> The parties acknowledge and agree that the terms hereof shall constitute a retransmission consent election notice (as required under applicable FCC Rules) for the 2009-2011 and 2012-2014 retransmission consent/must-carry election cycles.

The Agreement also contained a provision, Section 4(e), under which Cox would not be required to "retransmit the Digital Signal pursuant to Section 4 if the station is not, or ceases to be" affiliated with the ABC, CBS, FOX, or NBC networks.[13] Near the end of 2009, Perry announced plans to discontinue its affiliation with ABC, and Cox notified Perry of its intent to cease carrying the station on the system. Via letter, Perry objected that this would be a violation of the "Retransmission Consent Agreement." Thirteen days later, Perry sent a second letter to Cox that stated for the first time that it is a must carry station in the 2009-2011 carriage cycle, and formally requested carriage of WPGA pursuant to the must carry rules.

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[7] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Clarification Order, 8 FCC Rcd. 4142, 4144 (1993).

[8] 47 C.F.R. § 76.64(f)(3).

[9] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a). *See also* 47 C.F.R. § 76.57(f). ("[I]n the event that none of these specified channel positions are available due to a channel positioning request from a commercial television station affirmatively asserting its must-carry rights or such a request from a qualified local noncommercial educational station, the cable operator shall place the signal of such television station on a channel of the cable system's choice, so long as that channel is included on the basic service tier.").

[10] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(d).

[11] *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Declaratory Order, 23 FCC Rcd 14254 (2008) (*Carriage Election Order*).

[12] Petition at Exhibit B.

[13] *Id*. at Exhibit D, page 4; *see also* Exhibit D, page 2 (defining "Top-4 Station").

5. On the next day, December 18, 2009, Perry filed a complaint in Georgia Superior Court. The station sought a temporary restraining order ("TRO") and a permanent injunction to require Cox to continue to carry WPGA, on channel 6, for the duration of the Agreement. Perry also informed the court that it would be seeking relief from the Commission as a must carry station, and that the determination of must carry status rests solely with the Commission. The court granted the requested TRO, but ultimately granted Cox's Motion to Dismiss Perry's complaint, on the grounds that the contract is unambiguous, and only requires carriage of the WPGA signal so long as the station is and remains affiliated with the ABC, CBS, FOX, or NBC networks. The Court did, however, allow the TRO to stay in effect pending appeal. On March 19, 2010, Perry timely filed the instant carriage and channel positioning complaint.

6. Perry has asked us to resolve the question of whether it is a must-carry station under our rules, and specifically whether it can change its carriage election for the 2009-2011 carriage cycle after taking no action prior to October 1, 2008. We find that it can not, and therefore was and remains a must carry station. Based on Perry's failure to elect retransmission consent prior to October 1, 2008, it is undisputed by the parties that WPGA defaulted to must carry status.[14] Contrary to Cox's position, however, our rules do not contemplate the revision of a carriage election, even by the agreement of the parties. In *Cablevision Systems Corp.*, the one case that Cox cites to suggest otherwise, the mistaken "election" of must-carry status by the station in question was moot, due to a pre-existing retransmission consent agreement whose validity was not in dispute.[15] In the instant case, however, Perry defaulted to must-carry status, and there is no corresponding pre-existing retransmission agreement at issue. As the Bureau stated, permitting stations to change their election, even to correct an error, would "lead to administrative chaos," and would be "inconsistent with the rules governing the election process," which are straightforward.[16]

7. There is another essential difference between the *Cablevision* case and the instant case. As noted, the agreement in that case was a settled matter. Here, however, the terms and applicability of a private contractual agreement between Perry and Cox are at the heart of the dispute. In order to rule that Perry is a retransmission consent station in this case, Cox asks us to adjudicate a specific dispute concerning that private agreement, and this is simply outside the purview of the Commission.[17] As we clearly stated in 2003,

> Our specific role under Section 338 of the Act is to determine whether a television station is eligible for carriage and may appropriately assert its regulatory rights. Contractual issues are to be resolved by the parties or by courts of proper jurisdiction.[18]

Thus, Perry is correct that our role and responsibility in this proceeding is limited to resolution of the

[14] Petition at 2, Opposition at Summary, page ii.

[15] *Cablevision Systems Corp.*, CSR-4666-M, Memorandum Opinion and Order, 12 FCC Rcd. 13121 at ¶ 12 (CSB 1996).

[16] *Id*.

[17] Cox also argues that, as a matter of Commission precedent, Perry is estopped from claiming it is a must-carry station, because its petition to the Georgia Superior Court is predicated on its status as a retransmission consent station. Opposition at 13-15. Perry disputes that characterization, however, and the record before us does not support it. Opposition at Exhibit G, pages 8-9 (Perry Complaint for Declaratory and Injunctive Relief in the Superior Court of Bibb County, State of Georgia).

[18] *Telefuture Fresno LLC v. Echostar Communications Corp.*, CSR-6197-M, Memorandum Opinion and Order, 18 FCC Rcd. 22940, ¶ 12 (MB 2003); *see also Monroe, Georgia Water, Light, and Gas Commission v. Morris Network, Inc.*, CSR-6237-C and CSR-6254-C, Memorandum Opinion and Order, 19 FCC Rcd. 13977 (MB 2004) ("*Monroe*").

parties' rights and obligations pursuant to the Communications Act and our rules.[19]

8. Perry also asked that we order carriage of WPGA on Cox Channel 6. WPGA was not carried by Cox prior to 1995, and as a result its only carriage options under the Commission's channel positioning rules are Channel 58 (its over-the-air channel number), or "such other channel number as is mutually agreed upon by the station and the cable operator."[20] Perry asks us to look to the Agreement and find that the parties reached a mutual agreement for carriage on Cox Channel 6.[21] Perry's contractual channel positioning rights, however, are not an appropriate subject for Commission consideration. Our deliberations in this matter are limited to the rights of the parties under the Commission's rules. Under those rules, Perry has a right to carriage on Channel 58. The Commission rules also, as noted, allow parties to mutually agree to carriage on a different channel. We defer to the court to determine whether the contract in this case, or any other contract between the parties, constitutes such an agreement. As discussed above, we conclude only that WPGA has a right to mandatory carriage on Channel 58 (its over-the-air channel number) on Cox's system.

IV. CONCLUSION

9. The Commission "will not interject [itself] into specific arguments concerning private agreements between broadcasters and MVPDs."[22] By operation of our rules and pursuant to the requirements of the Communications Act, WPGA became a must-carry station for the 2009-2011 carriage cycle, with a right to demand carriage on Cox Channel 58, when Perry did not elect retransmission consent prior to October 1, 2008. Our rules do not prohibit stations that have elected or defaulted to must-carry from making side agreements with cable operators that can effect the terms of their carriage. They do not, however, contemplate or permit a retroactive revision of the station's status under the Commission's must carry regime. We emphasize, however, as we have in similar cases in the past,[23] that our decision here is not intended to suggest any opinion regarding the terms of any side agreement the parties may have reached. We find only that WPGA defaulted to and remains a must carry station for the 2009-2011 carriage cycle.

[19] Reply at 2.

[20] 47 C.F.R. § 76.57(d).

[21] Petition at 15 ("[T]he agreement expressly provides for carriage of the Station on cable channel 6.").

[22] *Monroe*, *supra* note 18, at ¶ 10.

[23] *See e.g.*, *NBC Subsidiary (NH), Inc. v. Echostar Communications Corp.*, CSR-6149-M, Memorandum Opinion and Order, 18 FCC Rcd. 15238, ¶ 9 (MB 2003); *see also, supra*, notes 18 and 22.

V. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3), and section 76.57 of the Commission's rules, 47 C.F.R. § 76.57, the petition filed by Radio Perry, Inc., licensee of television broadcast station WPGA-TV, Perry, Georgia, **IS GRANTED IN PART AND DISMISSED IN PART** as discussed herein.

11. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[24]

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau

[24] 47 C.F.R. § 0.283.